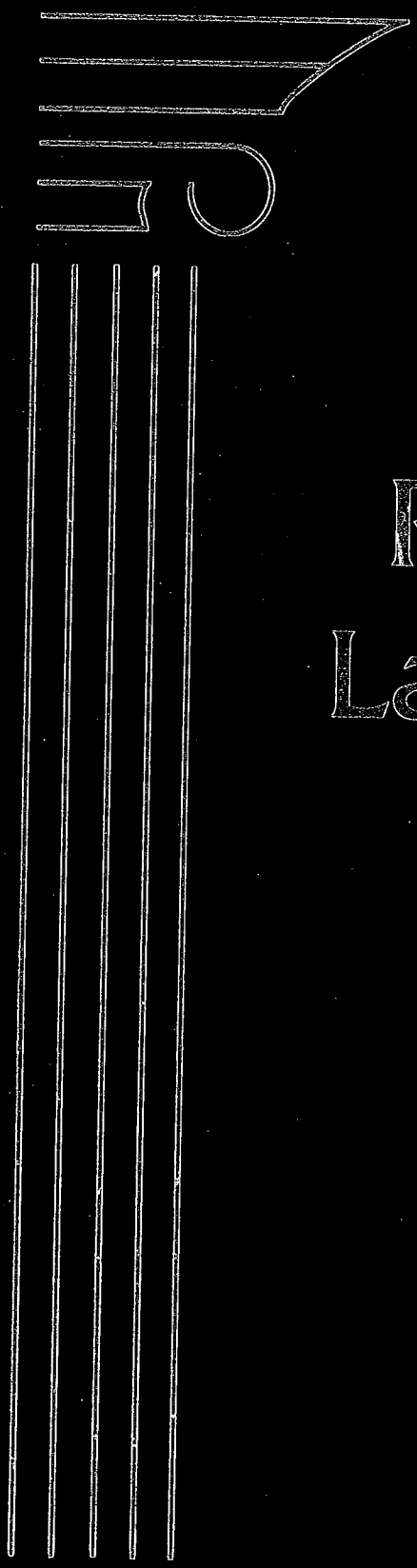

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Section 2, Fifth, however, applies before a person becomes an "employee" and prohibits carriers from requiring "any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization." Section 2, Eighth, states that this provision, like several others in Section 2, is "made a part of the contract of employment between the carrier and each employee." Section 2, Fifth, like the other 1934 additions to the Act, was intended "to advance the maintenance of effective labor organizations."[19] The only appellate court decisions construing Section 2, Fifth, have stressed, however, that it narrowly encompasses agreements or promises with respect to the choice of joining labor organizations and does not incorporate the protections against interference in self-organization and the choice of representatives embodied in Section 2, Third and Fourth.[20]

One district court held that plaintiffs were not mere "applicants" but rather were "transfer" employees protected by the RLA and could therefore proceed with their Section 2, Third and Fourth, claims against a railroad that purchased a substantial segment of their former employer's assets and allegedly denied them employment for antiunion reasons.[21] The court also held that the plaintiffs stated a cause of action against the purchasing carrier as a "successor" based on claims that the seller and purchaser entered into the transaction for the purpose of committing antiunion acts.[22]

Line Pilots Ass'n v. United Air Lines, 802 F.2d 886, 911–14, 123 LRRM 2617 (7th Cir. 1986), *cert. denied*, 480 U.S. 946, 124 LRRM 3192 (1987). *But see* Pyles v. United Air Lines, 79 F.3d 1046, 1050–52, 151 LRRM 2818 (11th Cir. 1996). (PanAm pilot claimed misapplication of agreement between United and ALPA containing mechanism for transfer of certain PanAm pilots to United).

[19]*Air Line Pilots Ass'n v. United Air Lines*, 802 F.2d at 915, 123 LRRM at 2638.

[20]*Id.* (holding that the protections of §§2, Third and Fourth, unlike those of §2, Fifth, did not apply before employees performed work in the service of a carrier); *Nelson*, 750 F.2d at 1236 (same).

[21]Adler v. I&M Rail Link, 13 F. Supp. 2d 912, 923, 158 LRRM 2647, 2654–55 (N.D. Iowa 1998). In so holding, the court relied on the broad definition of "employee" in *Pyles v. United Air Lines*, 79 F.3d 1046, 151 LRRM 2818 (11th Cir. 1996) (holding that RLA's compulsory arbitration provisions applied to dispute between carrier and applicant who was employee of another carrier). For a fuller discussion of the *Pyles* case, see Chapter 7, §§III.A. and VI.B.).

[22]*Adler*, 13 F. Supp. at 927. For further discussion of successorship under the RLA, see Chapter 4, §VIII.F.

III. PROTECTION OF EMPLOYEE RIGHTS TO SELF-ORGANIZATION

A. Jurisdiction

The 1934 amendments added administrative procedures to the Act, whereby the NMB determines the employees' choice of representative "in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."[23] The courts in general have continued to recognize a private right of action to enforce the right to organize without carrier interference, as set forth in *Texas & New Orleans R.R.*[24] The first such case in the Supreme Court under the amended statute, *Virginian Railway v. System Federation*,[25] upheld the power of the courts to compel a carrier to treat with a union certified by the NMB under the procedures of Section 2, Ninth.

Subsequently, the courts generally have exercised jurisdiction over actions brought against carriers for interference with employees' rights under RLA Sections 2, Third and Fourth, during union organizing drives. These courts have held or implied that neither the NMB's powers under Section 2, Ninth, to determine the identity of the employees' representative without interference by the carrier, nor the enforcement procedures specified in Section 2, Tenth, are the exclusive means for protecting employees' rights under Section 2, Third and Fourth.[26]

[23]RLA §2, Ninth. For a discussion of the NMB's determinations on interference with employee choice during representation campaigns, see *supra* at Chapter 4, §VI.

[24]Thus, the holding of *Texas & New Orleans R.R. v. Railway & Steamship Clerks*, 281 U.S. 548 (1930), that the Act's protections of the right of self-organization are judicially enforceable in a private suit, continues to apply after the 1934 amendments. In *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 926–27, 114 LRRM 3641 (1st Cir. 1983), for example, the court observed that in adopting the 1934 amendments to the Act, Congress did not express an intent to overrule *Texas & New Orleans R.R.* or to make proceedings by the U.S. Attorneys the exclusive means for enforcing the Act.

[25]300 U.S. 515, 1 LRRM 743 (1937).

[26]*See, e.g., Stepanischen*, 722 F.2d at 924, 926, 114 LRRM 3641, and cases cited therein (existence of criminal penalties does not preclude enforcement by private parties); Adams v. Federal Express Corp., 547 F.2d 319, 321, 94 LRRM 2008 (6th Cir. 1976) (because the RLA contains no analog to the NLRB's jurisdiction over unfair labor practices, courts must resolve interference claims under RLA),

Legal actions to seek relief for carrier interference with precertification organizing activities under Section 2, Third or Fourth, may be brought during the processing of representation disputes under Section 2, Ninth, as well as after the dispute has been resolved.[27] Supplementing the NMB's traditional remedies for carrier interference, discussed in Chapter 4, courts may adjudicate the legality of carrier conduct; issue injunctive relief; and order reinstatement, backpay, and restored benefits and seniority.[28] Some courts also have recognized a right to a jury trial and punitive damages.[29] One district court held that the NMB's findings in a representation proceeding that employees were not discharged for engaging in organizing activities neither bar the employees from suing the carrier for wrongful discharge in violation of the Act nor bind the court.[30]

In certain circumstances, courts have exercised jurisdiction over claims of carrier interference occurring after certification of a union.[31] The Supreme Court has noted, however, that Section 2, Third and Fourth, address primarily precertification rights of unorganized employees[32] and some courts have held or implied that they do not have jurisdiction of postcertification claims because adjustment boards will protect employee rights.[33]

The First Circuit summarized the various bases for federal court jurisdiction under Section 2, Third and Fourth, finding as a general

cert. denied, 431 U.S. 915, 95 LRRM 2326 (1977); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 75 LRRM 2658 (9th Cir. 1970) (criminal enforcement mechanism is not exclusive means of enforcing RLA); Beckett v. Atlas Air, Inc., 150 LRRM 2749, 2751 (E.D.N.Y. 1995) (same); Kent v. Fugere, 438 F. Supp. 560, 96 LRRM 3267 (D. Conn. 1977) (plaintiff not required to exhaust remedies at NMB or Adjustment Board before bringing suit under §2, Fourth); Associated Pilots of Alaska Int'l Air, Inc. v. Alaska Int'l Air, Inc., 96 LRRM 3233 (D. Alaska 1976) (district court rather than NMB had jurisdiction over interference claim); Griffin v. Piedmont Aviation, Inc., 384 F. Supp. 1070, 87 LRRM 2764 (N.D. Ga. 1974) (no union certified and no System Board; therefore court has jurisdiction over interference claim). *See also* America W. Airlines v. NMB, 986 F.2d 1252, 142 LRRM 2639 (9th Cir. 1992) (NMB lacks power to adjudicate the legality of carrier conduct). In some situations, courts have declined to resolve union claims of interference because the issues implicated representation disputes within the NMB's exclusive jurisdiction. *E.g.,* Texidor v. Ceresa, 590 F.2d 357, 100 LRRM 2477 (1st Cir. 1978); Ruby v. American Airlines, 323 F.2d 248, 54 LRRM 2202 (2d Cir. 1963); Aircraft Mechanics Fraternal Ass'n v. United Airlines, 406 F. Supp. 492, 91 LRRM 2248 (N.D. Cal. 1976); Machinists v. Air Indies Corp., 86 LRRM 2076 (D.P.R. 1973).

[27] *See, e.g.,* Adams v. Federal Express Corp., 90 LRRM 2742 (W.D. Tenn. 1975), *aff'd,* 547 F.2d 319, 94 LRRM 2008 (6th Cir. 1976), *cert. denied,* 431 U.S. 915, 95 LRRM 2326 (1977) (action brought during organizing drive); *Burke v. Compania Mexicana de Aviacion,* 433 F.2d 1031, 75 LRRM 2658 (action brought following organizing drive).

[28] For a full discussion of judicial remedies and procedures in carrier interference cases, see §III.F., *infra.*

[29] *See, e.g.,* Lebow v. American Trans Air, Inc., 86 F.3d 661, 667–72, 152 LRRM 2463 (7th Cir. 1996) (finding right to jury trial and punitive damages for claim of discharge because of union activities). See also §III.F., *infra.*

[30] Freiburger v. Emery Air Charter, 142 LRRM 2570 (N.D. Ill. 1992).

[31] *E.g.,* Fennessy v. Southwest Airlines, 91 F.3d 1359, 1362 (9th Cir. 1996), *cert. denied,* 520 U.S. 1210, 155 LRRM 2192 (1997) (carrier firing a represented employee in retaliation for his efforts to replace existing union with another union where employee had already lost contractual arbitration for wrongful discharge); Davies v. American Airlines, 971 F.2d 463, 465 (10th Cir. 1992) (wrongful termination in violation of public policy based on activism in conjunction with organizing activity); Arcamuzi v. Continental Airlines, Inc., 819 F.2d 935, 936–39 (9th Cir. 1987) (reversing dismissal and remanding for possible injunction for pilots seeking to bar requirement that they take an allegedly retaliatory polygraph test as a condition for employment after a strike); Air Line Pilots Ass'n v. Transamerica Airlines, 817 F.2d 510, 513–14 (9th Cir. 1987) (carrier transferring business to a newly formed corporate alter ego); Railway Labor Executives' Ass'n v. Boston & Maine Corp., 808 F.2d 150, 157–59 (1st Cir. 1986), *cert. denied,* 484 U.S. 830, 126 LRRM 2496 (1987) (abolition of jobs in retaliation for refusing to cross picket lines); Air Line Pilots Ass'n v. United Air Lines, Inc., 802 F.2d 886, 900 (7th Cir. 1986), *cert. denied,* 480 U.S. 946, 124 LRRM 3192 (1987) (plan to allow nonstriking pilots to bid for alleged vacancies left by striking pilots); Conrad v. Delta Air Lines, 494 F.2d 914, 917–18 (7th Cir. 1974) (wrongful discharge in retaliation for union activity); Ruby v. TACA Int'l Airlines, 439 F.2d 1359, 1364 (5th Cir. 1971) (airline's plan to move pilot base to El Salvador, allegedly to prevent union from acting as collective bargaining representative); Held v. American Airlines, Inc., 13 F. Supp. 2d 20, 26, 158 LRRM 2414 (D.D.C. 1998) (discriminatory denial of access to flight operations during ratification process for new collective bargaining agreement); Clift v. United Parcel Serv., 133 LRRM 2639, 2641 (W.D. Ky. 1990) (dismissal of probationary employees in retaliation for outspokenness against the company and plans to run for union office); Flight Attendants (AFA) v. Horizon Air Indus., 135 LRRM 2855, 2859 (D. Or. 1990) (carrier's circulation during negotiations of questionnaires to represented employees that showed an "unwillingness to deal fairly" with the union), *aff'd on other grounds,* 976 F.2d 541 (9th Cir. 1992); Teamsters Local 808 v. Providence & Worcester R.R., 576 F. Supp. 693, 703 (D. Conn. 1983) (demotions and discharges designed to undermine the union's status as collective bargaining representative).

[32] Trans World Airlines v. Flight Attendants (IFFA), 489 U.S. 426, 440, 130 LRRM 2657 (1989).

[33] *E.g.,* Flight Attendants (AFA) v. Horizon Air, 280 F.3d 901, 905–07 (9th Cir. 2002) (finding no exceptional circumstances necessitating judicial intervention "such as a policy motivated by anti-union animus or circumstances that significantly undermine the functioning of the union" and concluding the dispute over union insignia policy "was a matter for arbitration rather than district court litigation"). See §III.D., *infra,* and cases cited therein, for a full discussion of court jurisdiction over postcertification claims of carrier interference.